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In the Supreme Court of the United States

October Term, 1933.

No. 51.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner*,

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent*.

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

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vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

PRELIMINARY STATEMENT.

At the time this brief went to press on November 6, 1933, petitioner had served upon respondent only a galley proof of his proposed brief. Due to the shortness of time intervening between the dates of the receipt of the printed record, petitioner's brief (in galley form) and the oral argument before this Court, it is impossible for respondent to await the final draft of petitioner's brief before completing its brief. Hence, this brief must, of necessity, be confined to an answer to the brief in galley form served upon respondent by petitioner.

STATEMENT OF CASE.

This is an action brought by petitioner against respondent for wrongful death of petitioner's decedents, Marcus and Ellanore Andlauer. At the conclusion of petitioner's evidence, the District Court ruled that petitoner was not entitled to recover. From that judgment petitioner prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court (R. 73). Petitioner has brought the case to this court upon certiorari granted October 9th, 1933.

The evidence shows that on December 11, 1927, Marcus and Ellanore Andlauer, husband and wife, while riding in their automobile, were struck by one of respondent's trains at a railway crossing near St. Marys, Kansas, and sustained injuries which resulted in their death. At the place where the accident occurred, respondent's railway track ran east and west. Located to the south of the railway track and running parallel thereto was a highway known as "U. S. No. 40," from which the view to respondent's track was clear and unobstructed for at least three-quarters of a mile. St. Mary's College is located north of the railway track, and entrance to it from the highway is provided by means of a cross-highway extending from Highway No. 40 north into the college grounds and crossing the railway track at right angles.

A plat offered in evidence (R. 30) shows that the distance from the north edge of Highway No. 40 to the south rail of the track is 71½ feet. Seventeen feet south of the south rail and at the east edge of the cross-high-

way is a standard railway crossing sign. The area surrounding the scene of the accident is flat, open country (see Deft.'s Ex. "C," R. 36B) and the contour of the ground is such that the occupant of any vehicle upon either the cross-highway or U. S. Highway No. 40 would have a clear and unobstructed view of railroad trains approaching from the east for a distance of more than 2,000 feet (R. 34).

On the day of the accident the Andlauers were traveling west on Highway No. 40 in a closed automobile. Intending to visit their son, a student at St. Mary's College, they turned north upon the cross-highway and were struck at the crossing by a westbound passenger train operated by respondent, and almost instantly killed. The accident occurred on Sunday afternoon, at about 3:30 o'clock. The day was clear, cold and dry (R. 57).

The only eye-witness to the accident was Arthur Nagle. He was in an automobile traveling west on Highway No. 40, and was about 200 feet east of the Andlauer car when the collision occurred (R. 54). He testified on direct examination that the Andlauer car slowed up to make the turn and then proceeded at a speed of not more than 15 nor less than 10 miles per hour (R. 54) to the point where the collision occurred. The witness testified that his attention was first attracted to the train as it passed him about 500 feet east of the crossing. On cross-examination he testified that the train was somewhat ahead of him and that he was about 500 feet from the crossing when the Andlauer car made the turn into the cross-highway, and that the train was traveling 55 to 60 miles per hour and the Andlauer car about 12 miles per hour (R. 56, 57).

The amended petition is drawn in two counts, the first charging negligence causing the death of Marcus And-

lauer, and the second charging negligence causing the death of Ellanore Andlauer. Identical charges of negligence are made in each count. It is charged that the respondent was negligent in operating the train at a high and dangerous rate of speed; in failing to warn after respondent knew, or could have known, that the decedents were in a position of peril; in failing to slow or stop the train after the peril arose; in failing to slow the train while passing the college and entering the city of St. Marys; and in failing to sound a whistle or ring a bell within eighty rods of the crossing (R. 9, 10). The answer is a denial of the allegations of negligence and a plea of contributory negligence (R. 17, 18).

At the close of petitioner's evidence the trial court ruled that the decedents were guilty of contributory negligence as a matter of law. While no express ruling was made upon respondent's requests (R. 62) for peremptory instructions in the nature of demurrers to the evidence, the court sustained respondent's motion in the alternative for a directed verdict or for a dismissal of the cause (R. 62), and entered an order dismissing the cause with prejudice (R. 63).

Upon appeal, the Circuit Court of Appeals held that it was unnecessary to consider the issue of primary negligence (R. 67, 68); that Marcus Andlauer, the driver of the car, was guilty of contributory negligence as a matter of law because the undisputed facts show violation of his duty to stop, look and listen before driving into the path of the approaching train (R. 68); that Ellanore Andlauer was also guilty of contributory negligence as a matter of law, not upon the principle that the negligence of the driver should be imputed to her, but because she, independently of the driver, was charged by law with the duty to keep a lookout at rail-

way crossings and to give timely and effective warning to the driver (R. 68); that petitioner is not entitled to the benefit of any presumption that Ellanore Andlauer exercised due care, because the physical facts overcome the presumption and establish her negligence (R. 69, 70); that the doctrine of discovered peril (the last chance rule) cannot be invoked, first, because the train crew would have been warranted in assuming an intention on the part of petitioner's decedents to stop (R. 71) and, second, because there was no evidence that the train crew did, in fact, discover the alleged peril (R. 71); that the alleged error of the trial court in dismissing the case with prejudice rather than directing and requiring the jury to return a verdict for the respondent is purely technical, could not possibly have prejudiced the petitioner, and was waived because the exceptions saved at the trial did not call the attention of the trial court to the specific error alleged (R. 72, 73).

The issues presented upon this writ of certiorari involve consideration of the contributory negligence of both decedents; the claim of petitioner that the case is a proper one for the application of the last chance rule; and the claim that the alleged technical error of the trial court in dismissing the case rather than directing a verdict was preserved for review, was prejudicial to the petitioner, and violated his rights under the Seventh Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

I.

Marcus Andlauer was guilty of contributory negligence as a matter of law.

The accident occurred in broad daylight, at a crossing familiar to him, and where he had a view of the approaching train for a distance of more than 2,000 feet. It was his duty to look, listen and yield the right-of-way to the train.

Baltimore & Ohio R. R. Co. v. *Goodman,* 275 U. S. 66.
Railroad v. *Houston,* 95 U. S. 697.
Bradley v. *Mo. Pac. Ry. Co.,* 288 Fed. 484, 487.

II.

Ellanore Andlauer was also guilty of contributory negligence as a matter of law.

It was her affirmative duty to maintain a lookout for approaching trains, and to give timely and effective warning of danger to her husband; and this she failed to do.

Bradley v. *Mo. Pac. Ry. Co.,* 288 Fed. 484 (C. C. A. 8).
Chicago & E. I. Ry. Co. v. *Sellars,* (C. C. A. 8) 5 Fed. (2nd) 31.
Kutchma v. *Railway Co.,* (C. C. A. 8) 23 Fed. (2nd) 183.
Parramore v. *Railroad,* (C. C. A. 8) 5 Fed. (2nd) 912.
Noble v. *Railway,* (C. C. A. 8) 298 Fed. 381.

Atchison, T. & S. F. Ry. Co. v. *McNulty,* (C. C. A. 8) 285 Fed. 97.

Davis v. *C. R. I. & P. R. Co.,* (C. C. A. 8) 159 Fed. 10.

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Hall v. *Railway Co.,* (C. C. A. 3) 244 Fed. 104.

Brommer v. *Railway Co.,* (C. C. A. 3) 179 Fed. 577, 581.

Phila. & R. Ry. Co. v. *LeBarr,* (C. C. A. 3) 265 Fed. 129.

Southern Ry. Co. v. *Priester,* (C. C. A. 4) 289 Fed. 945, 949.

Pennington v. *Southern Ry. Co.,* (C. C. A. 5) 61 Fed. (2nd) 399.

Fluckey v. *Southern Ry. Co.,* (C. C. A. 6) 242 Fed. 468.

Summers v. *Denver Tramway Co.,* (C. C. A. 10) 43 Fed. (2nd) 286.

Garrett v. *Pennsylvania R. Co.,* (C. C. A. 7) 47 Fed. (2nd) 10.

Little v. *Hackett,* 116 U. S. 366.

III.

Respondent cannot be held liable under the last chance doctrine.

A. The Andlauers were not shown to be oblivious to danger until it was too late to warn them, and the train crew had a right to assume that they would not go into the path of the approaching train.

Illinois Central Ry. Co. v. *Ackerman,* (C. C. A. 8) 144 Fed. 959.

Toledo, St. L. & W. R. R. Co. v. *Allen,* 276 U. S. 165, 173.

B. If Ellanore Andlauer warned her husband, there was no duty on the part of the train crew, under the last chance theory, to warn her, and upon that theory her death was brought about solely by the negligence of her husband in failing to heed the warning, and not by the negligence, under the last chance rule, of the respondent.

IV.

There is no merit to petitioner's contention that his rights under the Seventh Amendment to the Constitution were violated by the action of the trial court in dismissing the case with prejudice rather than directing a verdict in favor of respondent.

A. The exceptions saved by petitioner did not direct the attention of the trial court to the claim that a dismissal would constitute denial of the right of trial by jury, and therefore the point was not saved for review.

United States v. *U. S. Fidelity Co.*, 236 U. S. 512, 529.
Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 82.
Guerini Stone Co. v. *Carlin Construction Co.*, 248 U. S. 334, 348.
Beaver v. *Taylor*, 93 U. S. 46, 55.
Robinson & Co. v. *Belt*, 187 U. S. 41, 50.
Harvey v. *Tyler*, 2 Wall. 328, 339.
Beckwith v. *Bean*, 98 U. S. 266, 284.
Mouler v. *American Ins. Co.*, 111 U. S. 335, 337.
Bowman v. *Railroad*, 184 Fed. 697 (C. C. A. 8).

B. If it be conceded that the trial court's action was erroneous, and was properly preserved for review, the alleged error was one that did not affect the substantial rights of petitioner, and, under the statute, does not justify reversal of the cause.

40 Stat. at L. 1181 (Tit. 28, Sec. 391, U. S. C. A.).
Gasoline Products Co. v. *Champlin Co.*, 283 U. S. 494, 499.
Coughran v. *Bigelow*, 164 U. S. 301, 307.
Central Transportation Co. v. *Pullman's Car Co.*, 139 U. S. 24, 39.
Oscanyan v. *Arms Co.*, 103 U. S. 261, 264.
Herron v. *Southern Pacific Co.*, 283 U. S. 91.
Bohenik v. *Delaware & Hudson Co.*, 49 Fed. (2nd) 722, 724 (C. C. A. 2) (certiorari denied, 284 U. S. 643).

ARGUMENT.

I.

Marcus Andlauer was guilty of contributory negligence as a matter of law.

So far as Marcus Andlauer is concerned, this record presents but another tragic instance of the driver of an automobile running a losing race with death at a railway crossing. The accident occurred in broad daylight, in open, level country. Andlauer knew the crossing. He had a view of the track for a distance of more than 2,000 feet to the east. It was his plain duty to look before he crossed and to yield the right of way to the approaching train. He either failed to look, or he took the chance of crossing in safety. In either event the law is well settled that no negligence of the railroad company, either in failing to warn or otherwise, will give rise to a submissible jury issue.

Mr. Justice Holmes, in the case of *Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66, under facts far more favorable to the plaintiff than the facts presented in the present record, declared (l. c. 69):

> "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. Under such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further

precaution, he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in *Flannelly* v. *Delaware & Hudson Co.*, 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts."

Again, in *Railroad* v. *Houston*, 95 U. S. 697, Mr. Justice Field, dealing with a record where a pedestrian was killed while walking across the track at a place where a train could have been seen for a distance of three-quarters of a mile, reversed a judgment for the plaintiff, declaring that the trial court should have sustained a motion for a directed verdict. In the opinion (l. c. 702) it is stated:

"The failure of the engineer to sound the whistle or ring the bell, if such were the facts, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be

cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

The Circuit Court of Appeals for the Eighth Circuit, in the case of *Bradley* v. *Missouri Pacific R. R. Co.*, 288 Fed. 484, in an opinion by the late Judge Kenyon, and upon facts similar with those in the case at bar, thus expresses the rule (l. c. 486, 487):

"The only reasonable inference that can be drawn from their conduct is that they did not look, or if they did and saw the train, deliberately took the chance of beating it over the crossing. If the former, they were guilty of gross negligence—if the latter, gross recklessness. If parties driving automobiles persist in gambling with death at railroad crossings, their estates should not be augmented by damages if death win. Care, not chance, is the requisite at railroad crossings."

Under the undisputed facts, with a clear and unobstructed view in broad daylight, it cannot be disputed that had Marcus Andlauer looked even after he had turned into the cross-highway, he could have seen the approaching train in ample time to have stopped his automobile and thus have avoided the collision. If he looked and saw and took the chance of beating the train

over the crossing he was guilty of "gross recklessness." If he failed to look then his negligence in failing so to do bars recovery. Upon either theory Andlauer stands convicted of such contributory negligence as a matter of law as bars his recovery and, therefore, the action of the trial court in taking the case from the jury was proper.

II.

Ellanore Andlauer was also guilty of contributory negligence as a matter of law.

Ellanore Andlauer, the wife, was also a traveler upon the highway. She was charged with the positive duty of exercising due care for her own safety. Her contributory negligence does not arise upon any theory that the negligence of her husband must be imputed to her. Independently of his negligence the law imposed upon her the positive duty to make use of her senses of sight and hearing—to maintain a lookout for approaching trains, and to warn her husband of danger at a time when such warning would be effective. It is upon the theory that the evidence conclusively shows her violation of that positive duty, that both the trial court and the Court of Appeals held, as a matter of law, that she was guilty of contributory negligence.

The Court of Appeals, in affirming the judgment as to Ellanore Andlauer, supported its decision by a long line of authority, citing cases largely from the Eighth Circuit. Chief among them is *Bradley* v. *Mo. Pac. Ry. Co.*, 288 Fed. 484. The facts in that case are almost identical with those in the case at bar.

There the court holds that Bradley, a guest in the automobile, "is conclusively shown by the record to have been guilty of contributory negligence," because of his failure to give timely and effective warning to Brown, the driver. The late Judge Kenyon, in writing that opinion, calls to its support a wealth of authority from both state and national courts, and decides (l. c. 495)

> "The duty was upon him in approaching this crossing to ascertain the approach of a train by exercising his faculties of sight and hearing at such a place and within such distance from the crossing as would be effective. He could not rely upon Brown to protect him. The duty to look was as much upon him as upon Brown. There is no partition in the usual Ford car separating the front and rear seats; no reason why he could not have warned Brown in time to stop. If he failed to look where he could effectively see, he was guilty of negligence. If, seeing, he failed to warn Brown, he was equally guilty of negligence, and the negligence of the railroad company would not excuse him. While the railroad company is under legal obligation to give warnings at crossings, parties cannot rely thereon and fail to exercise their own faculties for protection. * * * Here the hazard was brought about as much by Bradley's negligence as by Brown's. We think the question of contributory negligence here was one of law for the Court, as the evidence relating thereto was undisputed and but one conclusion can be drawn therefrom by reasonable minds, and that is that Bradley was guilty of contributory negligence, and the Court would have been justified in so holding as a matter of law. *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 417; *Union Pacific Railway Co.* v. *McDonald*, 152 U. S. 262, 283; *Railroad Co.* v. *Houston*, 95 U. S. 697; *Baltimore & Ohio R. R. Co.* v. *Griffith*, 159 U. S. 603; *Dernberger* v. *Baltimore & O. R. Co.*, 243 Fed. 21."

The Bradley decision has been adhered to, not only in the Eighth Circuit, but in many other Circuits. It would burden this brief unduly to discuss the facts of the numerous cases. A few of those from the Eighth Circuit are:

Chicago & E. I. Ry. Co. v. *Sellars*, 5 Fed. (2nd) 31.
Kutchma v. *Railway Co.*, 23 Fed. (2nd) 183.
Parramore v. *Railroad*, 5 Fed. (2nd) 912.
Noble v. *Railway*, 298 Fed. 381.
Atchison, T. & S. F. Ry. Co. v. *McNulty*, 285 Fed. 97.

The cases from the Third Circuit adhere to the same rule:

Phillips v. *Davis*, 3 Fed. (2nd) 798.
Hall v. *Railway Co.*, 244 Fed. 104.
Brommer v. *Railway Co.*, 179 Fed. 577, 581.
Philadelphia & R. Co. v. *LeBarr*, 265 Fed. 129.

The Fourth Circuit, in following the rule, cite for authority the Brommer case (*supra*) and others, as illustrated by:

Southern Ry. Co. v. *Priester*, 289 Fed. 945, 949.

The latest decision in the Fifth Circuit upon the subject is *Pennington* v. *Southern Ry. Co.*, 61 Fed. (2nd) 399, where the court cites the Bradley case and the case of *Garrett* v. *Pennsylvania Ry. Co.*, (C. C. A. 7) 47 Fed. (2nd) 10, in support of the principle here being considered.

The only decision we have found from the Sixth Circuit is the case of *Fluckey* v. *Southern Ry. Co.*, 242 Fed. 468,

where, although the precise point here considered is not directly involved, the court cites the Brommer case in support of the duty of the traveler to stop, look and listen.

The Tenth Circuit, in the case of *Summers* v. *Denver Tramway Co.*, 43 Fed. (2nd) 286, holds that the guest in an automobile who neglects to maintain a lookout and to warn the driver, is guilty of contributory negligence, and in support of its conclusion cites not only the Bradley case, but also the Brommer, LeBarr, Noble, Priester, Sellars, and Parramore cases (*supra*) and the older case (from the Eighth Circuit) of *Davis* v. *Chicago, R. I. & P. R. Co.*, 159 Fed. 10.

The First and Second Circuits, so far as we are informed, have not yet considered the point.

It will thus be seen that the overwhelming weight of authority as announced by the various Circuit Courts of Appeal in the decisions referred to, abundantly supports the Eighth Circuit rule that the guest in an automobile is to be regarded as any other traveler upon the highway, and is charged with the positive duty of maintaining a lookout at railway crossings, and of warning the driver of the approach of a train.

The Petitioner here, under Point V of his brief, complains that the rule of the Eighth and other circuits is in conflict with the rule as announced by the Circuit Courts of Appeal for the Seventh Circuit in one case and in the Ninth Circuit in the other case.

From the Seventh Circuit he cites the case of *Railway Co.* v. *Divine*, 39 Fed. (2nd) 537. The facts in the Divine case distinguish it from the case at bar, and from the facts existent in all of the other cases to which we have referred. The question there involved was whether or not a wife, riding on the front seat of an automobile with

her husband, was under a duty to maintain a lookout and to warn *when the evidence showed that her attention was directed to the care of her children.* The Kutchma, Priester and Noble cases (*supra*) are cited with approval in support of the general rule; but (l. c. 539) it is pointed out that:

> But, again, *this depends upon the facts of the particular case.* Here was this woman, riding beside her husband on the front seat of a Ford car, *holding on her lap her 3 year old child. On the back seat were three other of their children of tender years.* The husband was an experienced driver, and nothing appears why she might not safely intrust him with that task. To one knowing about children it must at once be plain that this mother, specially charged, as no doubt she was, with their care on this journey, *was quite exclusively occupied with that duty.* The care of the one on her lap would doubtless have been quite sufficient to engage her attention; but, when this is supplemented by the care of three more young ones on the back seat, it seems quite evident that it would leave little, if any, opportunity for her to indulge in 'back seat driving.' This situation itself cries out against charging her with contributory negligence in failing to keep a lookout for places of danger." (Italics ours.)

The Divine case, therefore, cannot be said to be in conflict with the rule announced in the Bradley case and followed by so many other decisions. There is no evidence in the case at bar which could possibly bring it within the exception to the general rule applied in the Divine case.

The Seventh Circuit does not entertain views that are out of harmony with the general rule. This is illustrated by the later case of *Garrett* v. *Pennsylvania R. Co.*, 47

Fed. (2nd) 10, in which the Seventh Circuit cites and follows the Bradley case in holding that the occupant of the back seat of an automobile, driven by her mother, and killed at a railway crossing under circumstances quite similar to those in the case at bar, owed the affirmative duty to look and to warn, and that her neglect of that duty is contributory negligence that defeats recovery for her death. There is, therefore, no possible conflict between the opinion of the Eighth Circuit in the case at bar and the holding of the Seventh Circuit in the Divine case.

We come now to the decisions from the Ninth Circuit, with which petitioner claims the decision here is in conflict.

The first is *Southern Pacific Co.* v. *Wright,* 248 Fed. 261. The opinion was written by District Judge Dietrich. Circuit Judge Hunt wrote a vigorous dissenting opinion which points out the obvious weakness of the majority opinion, and its utter lack of harmony with the prevailing general rule followed in the cases from the other circuits referred to, *supra.*

The Wright case recognizes the *principle* that the guest in an automobile is under a positive duty to exercise due care. It differs from the Bradley decision and others *only* upon the question of *what is to be done* by the guest to free him from a charge of contributory negligence. The majority opinion holds that it is the duty of the guest to *remain silent,* because, reasons the court (l. c. 264):

> "Any other course is fraught with danger. Interference by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated; in the long run, the greater safety lies in letting the driver alone."

Assuming the soundness of the court's conclusion thus expressed, the rule of silence has always been limited to those cases where an unexpected emergency arises (see the Bradley case, l. c. 495). It certainly has no application in the case at bar. Here there was no emergency shown. Here, Mrs. Andlauer knew, from the time she left Topeka, that she was to cross this track; and it was her duty, both before and after the car turned into the cross-highway, to ascertain if a train was approaching. Absent evidence showing unusual circumstances upon which the rule in the Wright case could be invoked, that case clearly gives the petitioner no support.

The next decision cited by petitioner is *Trenholm* v. *Railway Co.*, 8 Fed. (2nd) 452. That case is distinguished from the case at bar because in that case Miss Trenholm did, in fact, warn her father, the driver, by exclaiming, "Oh, Daddy, there's the train!" and because her age was such as to suggest that reasonable minds might differ as to her responsibility to watch and to warn. The trial court (4 Fed. [2nd] 562) followed the Bradley case in sustaining a demurrer. The Court of Appeals, in reversing the District Court, held that the question of her contributory negligence was for the jury. The opinion concludes:

> "Considering, then, *the age of the deceased, her position in the car,* the fact that the car was driven by her father, the fact that she had no notice that he was either incompetent or reckless, and *all the surrounding circumstances,* we have little hesitation in saying that the *question* of her contributory negligence was one of fact for the jury." (l. c. 455; italics ours.)

Thus it is evident that the court decided the Trenholm case upon the particular circumstances of the evidence before it. There are no such distinguishing or peculiar circumstances in the case at bar. But, if the ruling in the Trenholm case is as petitioner contends, then it is in conflict with the decisions in all of the other circuits; which express the sounder rule.

The last case relied upon by petitioner is the Ninth Circuit decision of *Southern Pacific Co.* v. *Stephens*, 24 Fed. (2nd) 182. The Stephens case cannot be considered upon the question because the state of the record is not shown in the opinion. It is not shown that Stephens warned, or that he had opportunity to warn. The "surrounding circumstances" are not stated. The opinion merely cites the Wright case and holds that the question of Stephens's contributory negligence was for the jury.

When analysis is made of the peculiar facts there involved, we can see nothing in these three decisions from the Ninth Circuit seriously conflicting with the views expressed in all of the other circuits in the cases cited. If this court regards them as conflicting, then we have no hesitancy in urging that this court should approve the majority rule.

The majority rule is thoroughly sound. It recognizes and enforces the duty of the traveler upon the highway to observe the movements of trains at railway crossings and to exercise a reasonable degree of care for his own safety. It enforces the duty of every traveler to know that it is impossible to stop the train, but easy to stop the automobile.

These principles have been thoroughly established by this court, as applied to the driver, in a long line of decisions of which the Goodman case (*supra*) is a leading

example. They should also be applied to the other occupants of motor vehicles. Except in those cases where the occupant is in the position of a passenger for hire (see *Little* v. *Hackett*, 116 U. S. 366), the public welfare and the safety of the traveler upon the highway demands that the guest maintain a lookout, and that he warn when warning would be effective. No other rule will operate to limit the ever mounting casualties that occur from automobile accidents. The rule of silence is limited to those cases where the emergency is sudden, and a warning might prove to be disconcerting.

The Court of Appeals, therefore, was right in ruling that the record in this case conclusively convicts Ellanore Andlauer of contributory negligence as a matter of law.

III.

Respondent cannot be held liable under the last chance doctrine.

There is no room in this record for the application of the last chance doctrine. From the moment the automobile turned into the cross-highway, it was traveling at a speed of only 12 miles per hour (R. 57), while the train was approaching at the rate of from 55 to 60 miles per hour. The train, traveling at a speed approximately 5 times greater than that of the automobile, is thus conclusively shown to have been only 357.5 feet from the crossing at the time the automobile turned into the cross-highway, a distance of 71.5 feet from the crossing. The evidence, however, shows that it was impossible to stop the train within less than 500 to 1,000 feet (R. 59).

Therefore, it cannot be said that the train could have *stopped* before reaching the crossing.

Petitioner's argument, however, is that, although the train could not stop, a warning could have been given. To that argument there are two conclusive answers.

In the first place, until the automobile reached a point on the cross-highway where it was apparent, either that it could not thereafter stop before going into the path of the on-coming train, or that its occupants were oblivious to their danger, there was no duty, under the last chance doctrine, to warn them. This is true because, absent something to indicate obliviousness, the train crew had the right to assume that the travelers would exercise ordinary care for their own safety and would not heedlessly drive into danger.

Under the record here, there is neither pleading nor proof of obliviousness. No fact appears from which it may be said that the approaching car exhibited any appearance of the obliviousness of its occupants.

Petitioner, without *evidence* of obliviousness, and without even having *alleged* it in his amended petition, now seeks to torture respondent's answer into an *admission* of their obliviousness to danger. The answer, however, is not susceptible of that construction. There it is only pleaded that the Andlauers failed to look—not that there was anything in their actions which brought home to the engineer the fact that they were oblivious to danger. The answer alleges only the facts as they appeared to the pleader *after* the event, not as they appeared to the *train crew before* the accident occurred.

Absent, therefore, either pleading or proof of obliviousness, the train crew had the right to assume that the automobile would stop. When it finally became apparent that they would not stop, it was then too late for a

warning to save them; because a warning at *that* time would come only at a time when they had reached the point of *actual danger*, the point where they themselves could not stop.

These views are well supported by authority. In the case of *Illinois Central Railroad Co.* v. *Ackerman*, 144 Fed. 959, the exact situation here presented arose. Ackerman drove upon a railway track in broad daylight, at a point where he could have seen the approaching train as easily as the train crew could have seen him. It was there argued that the train crew owed him a duty, under the last chance rule, to warn him. The opinion was written by Judge Hook, and was concurred in by Mr. Justice Van DeVanter, then a member of the court in Eighth Circuit. The court, denying recovery under that theory, holds (l. c. 961, 962):

> "The men upon the train were not obliged under the circumstances to *anticipate* his negligence. They could very well have assumed either that *he knew of the approach of the cars and intended to stop* at the customary safe distance or that he would look when near the track and then stop before going upon it. They did not know that he was inattentive and absent minded, nor did they know of his purpose to continue his onward course. *He was not in a place of danger until it was too late to prevent the accident.* The negligence of the employees of the railroad company and that of the deceased were concurrent and continuous down to the very moment of the collision and there is no room for the contention that the negligence of the latter should be regarded as a *known condition* upon which the negligence of the former subsequently operated." (Italics ours.)

This court entirely agrees with the decision in the Ackerman case, and adheres to the rule that, unless there be *knowledge of obliviousness* brought home to the train crew by some act or condition from which it should be realized that obliviousness does in fact exist, the last chance rule does not apply. In *Toledo, St. L. & W. R. R. Co.* v. *Allen*, 276 U. S. 165, 173, this court cites the Ackerman decision with approval, and rules:

> "There is nothing to sustain a finding that plaintiff was in any danger other than such as is usually incident to his employment or that any member of the train crew *knew or had any reason to believe that he was oblivious of the situation.* *Illinois Central Railroad Co.* v. *Ackerman*, 144 Fed. 959, 962. In the absence of knowledge on their part that he was in a place where he was liable to be struck *and oblivious of that danger*, they were not required to vary the switching practice customarily followed in that yard or to *warn or to take other steps to protect him.* There is no evidence to sustain the allegation that the other employees saw, or negligently failed to discover, plaintiff in a 'position of peril and *oblivious thereof.*' There was no foundation for a finding in favor of the plaintiff on that issue." (Italics ours.)

In the case at bar it cannot be said that there was any evidence to show that, even if the Andlauers were oblivious to danger after they turned into the cross-highway, their obliviousness was apparent to or should have been discovered by the train crew. Consequently, they owed no duty, under the last chance rule, to warn until it became apparent that the automobile did not intend to stop—and then it was too late to warn. Such a record

does not make a case for the jury under the last chance rule.

In the second place, if Ellanor Andlauer did in fact see and warn her husband, there was no necessity for further warning from the train crew. Upon that theory, her death was brought about solely by her husband's failure to heed the warning. The respondent did not contribute to *his* negligence in that respect, because, after the automobile turned into the cross-highway, all that was left for the train crew to do was to warn—and warning had already been given by the wife.

Upon either of the two theories mentioned, therefore, the last chance doctrine does not apply. The Court of Appeals properly so decided. The first reason given in its opinion (R. 70, 71), to the effect that the train crew had the right to assume that the automobile would stop, sufficiently disposes of the point now raised.

That being true, we are not concerned with the further holding of the Court of Appeals that, because actual knowledge of the train crew was not shown, the last chance rule does not apply. Hence we shall not indulge in discussion of the merits of that interesting but wholly immaterial question. We submit petitioner's contention is without merit.

IV.

There is no merit to petitioner's contention that his rights under the Seventh Amendment to the Constitution were violated by the action of the trial court in dismissing the case with prejudice rather than directing a verdict in favor of respondent.

The record discloses that, at the close of petitioner's evidence, respondent requested peremptory instructions in the nature of demurrers as to each count of the petition (R. 62) and then moved the court in the alternative to direct a verdict for the respondent or dismiss the case upon the merits with prejudice (R. 62). The trial court then reviewed the law questions raised by the demurrers, discussed the Can case (*U. S. Can Co.* v. *Ryan,* 39 Fed. [2d] 445, 8 C. C. A.) and the Bradley case (*Bradley* v. *Mo. Pac. Ry. Co.,* 288 Fed. 484, 8 C. C. A.) and sustained respondent's motion. The order entered upon that ruling was one of dismissal with prejudice.

The only exceptions saved by the petitioner were:

> "And the plaintiff then and there excepted to the ruling of the court in sustaining the defendant's motion in the alternative and in dismissing the petition and causes of action, respectively, set forth in counts one and two of the petition, with prejudice, and in entering a judgment dismissing the said cause, with such prejudice, and for costs against the said plaintiff, *for the reason that under the pleadings and the evidence the plaintiff was entitled to recover and was entitled to have the cause submitted to the jury* upon count one and also upon count two of the plaintiff's petition and the said exceptions were taken severally and to the action of the court upon each count of the plaintiff's petition." (R. 63, 64; italics ours.)

Upon this record the plaintiff insists that he was denied the right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. For two reasons, the point is without merit.

A.

The exceptions saved by petitioner did not direct the attention of the trial court to the claim that a dismissal would constitute denial of the right of trial by jury, and therefore the point was not preserved for review.

The exceptions taken by petitioner were not directed to the *form* of the ruling. The reason assigned was one applicable only to the substantive question of whether or not a submissible issue had been tendered by the evidence. There was nothing in the exception to challenge the attention of the trial court to the Seventh Amendment. It was not even intimated that petitioner was complaining because the court did not go through the formality of requiring the jury to return a verdict. Had the question been raised, opportunity would have been afforded, then and there, to require a formal verdict; and thus obviate a mistrial.

In harmony with a long line of decisions by this court, the Circuit Court of Appeals properly held (R. 72, 73) that, even if a technical error had been committed, the absence of a specific exception prevented consideration of the question, thus raised for the first time in the court of review. The opinion comments:

> "The rule is a just one and affords an opportunity, both to the trial court and opposing counsel, to correct the error, which in the instant case goes only to matters of form." (R. 73.)

This court has repeatedly held that an exception, to preserve a point for consideration, must call attention to the precise point relied upon for reversal. Thus, in *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529, Mr. Justice Pitney, speaking for the court, said:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and *precise point* in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials, due to inadvertent errors, may thus be obviated. An exception, therefore, *furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. Beaver* v. *Taylor*, 93 U. S. 46, 55; *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50; *Addis* v. *Rushmore*, 74 N. J. L. 649, 651; *Holt* v. *United Security Life Ins. Co.*, 76 N. J. L. 585, 593. And the practice respecting exceptions in the federal courts in unaffected by the Conformity Act, Sec. 914, Rev. Stat. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 553; *St. Clair* v. *United States*, 154 U. S. 134, 153." (Italics ours.)

Again, in the case of *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, the court, in calling attention to the fact that the appellant was not accorded an opportunity to present its exceptions at the trial, states:

> "To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials, due to inadvertent errors, may thus be obviated.

United States v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348."

So, also, in *Beaver* v. *Taylor*, 93 U. S. 46, 55, the court ruled:

> "One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so (citing authority). An exception in the form we are considering it entirely defeats that object."

And in *Robinson & Co.* v. *Belt*, 187 U. S. 41, 50, Mr. Justice Brown comments:

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record."

In many other cases the same principle has been declared. A number of them have been collected in our summary of the argument.

Applying that principle to the case at bar, it will readily be seen that the exceptions here went only to the substantive question involved, and did not direct the attention of the trial court to the fact that the supposed error lay in the *form* of the order by which the court

terminated the case. Had it been suggested that a dismissal, rather than a directed verdict, would deprive plaintiff of a jury trial, all possibility of error could and would have been avoided by directing a verdict.

B.

If it be conceded that the trial court's action was erroneous, and was properly preserved for review, the alleged error was one that did not affect the substantial rights of petitioner, and under the statute, does not justify reversal of the cause.

If it be conceded that the trial court committed error in dismissing the case with prejudice rather than directing a verdict, and if it be conceded that the specific error thus committed was called to the attention of the trial court by proper exception, nevertheless the error is not one which would justify this court in reversing the case. The Congress, in 1919, added an amendment to Title 28, Sec. 391, U. S. C. A. (40 Stat. 1181), as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

It is inconceivable that the supposed error in the instant case could have affected the substantial rights of the plaintiff. The error committed relates only to a matter of form or procedure and not to a matter of substance. Consequently, the point, even if preserved, is not one that would justify reversal.

This court has repeatedly held that the rights guaranteed by the Seventh Amendment are rights founded upon substance and not on form. In the recent case of *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498, it is said:

> "It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See *Herron* v. *Southern Pacific Co.*, *ante*, p. 91 (283 U. S. 91). Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See *Walker* v. *Southern Pacific R. Co.*, 165 U. S. 593, 596."

And in the Walker case, cited *supra*, the court (l. c. 596) declared:

> "The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. *Its aim is not to preserve mere matters of form and procedure, but substance of right.* This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and courts may not set aside any legislative provision in this respect because the form or action—the mere manner in which questions are submitted—is different from

that which obtained at the common law." (Italics ours.)

This court has always held that a trial court does not violate the Seventh Amendment by deciding that the evidence tenders no issue of fact.

Coughran v. *Bigelow*, 164 U. S. 301, 307;
Central Transportation Co. v. *Pullman's Car Co.*, 139 U. S. 24, 39;
Oscanyan v. *Arms Co.*, 103 U. S. 261, 264;
Herron v. *Southern Pacific Co.*, 283 U. S. 91.

When once it is recognized that the only substantive right guaranteed by the Seventh Amendment is the right to have *controverted issues* of fact decided by a jury, then all questions which might arise as to the method by which the trial court carries into effect his decision that the case presents no issues of fact, are questions of form or procedure with which the Seventh Amendment is not concerned.

It is true that at common law a party could not be subjected to non-suit against his will. It is not true that compulsory non-suit violates the Seventh Amendment. In those states where, by statute, compulsory non-suit is adopted as a part of the state practice, the federal courts, under the Conformity Act, follow the same practice. See *Central Transportation Co. v. Pullman's Car Co., supra.* If compulsory non-suit is violative of any substantive right guaranteed by the Seventh Amendment, then state legislation, followed by reason of the Conformity Act, as illustrated by the Central Transportation case, overrides the Constitution.

Since the right to take a case from the jury exists in a proper case, notwithstanding the Seventh Amendment,

then the manner of taking the case from the jury is a purely formal or procedural matter with which the Seventh Amendment is not concerned. This point has been ably discussed by Judge Augustus N. Hand for the Circuit Court of Appeals, Second Circuit, in the case of *Bohenik* v. *Delaware & Hudson Co.*, 49 Fed. (2d) 722, 724 (certiorari denied 284 U. S. 643). We quote from that opinion:

> "There is no question that, if Judge Thacher had directed a verdict instead of dismissing the complaint and ordering a non-suit, the effect of his decision could not have been doubted. All the New York statute does is to make a dismissal at the close of plaintiff's case the equivalent in effect of a directed verdict if the record contains no statement that dismissal was not on the merits. This, in our opinion, does not interfere with the right of trial by jury. Here a trial with a jury was held, but the plaintiff's evidence was insufficient to establish her case. The defendant might have requested and obtained the direction of a verdict in its favor. Instead of that, the court ordered a judgment which, under the New York statute, is given the same effect as the direction of a verdict which the defendant might have required. *To raise a mere mode of procedure into a substantive right and to hold that the state statute cannot furnish the equivalent of a directed verdict though the effect upon the parties would be the same seems to us to place form above substance.* It would be quite different to direct judgment *non obstante veredicto* where decision on a motion for judgment made during the trial had not been reserved. That was in substance what was done by the Circuit Court of Appeals in the Slocum case and is not what was done here. The Supreme Court has sustained the practice of granting compulsory non-suits authorized by state statutes. *Cough-*

ran v. *Bigelow*, 164 U. S. 301, 17 S. Ct. 117, 41 L. Ed. 442; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55. It is but a short step from this to treat such nonsuits like directed verdicts both in cases where the judge has in terms dismissed 'on the merits' and in cases where he has dismissed generally, but the statute has given his acts the same effect.

"The Seventh Amendment does not require that old forms of procedure must be retained where the substantial rights of the parties are in fact preserved. *In re Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919. We think that the Constitution does not stand in the way of the application of Section 482 of the New York Civil Practice Act to trials in the United States courts." (Italics ours.)

The decision of this court in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, does not at all conflict with the views so ably expressed by Judge Hand. In the Slocum case the defendant moved for a directed verdict but that motion was overruled and *the case was submitted to the jury*. Thereafter, following state practice, the defendant moved for judgment *non obstante veredicto*. That motion also was denied. On appeal the Circuit Court of Appeals determined that the motion for a directed verdict should have been sustained, and that the case should be remanded with directions to enter judgment for defendant, notwithstanding the verdict. This court held that such action was a re-examination of issues of fact which had once been submitted to the jury and thus violated the Seventh Amendment which commands that:

"No fact *tried* by a jury shall be otherwise *re*-examined in any court of the United States than according to the rules of the common law." (Italics ours.)

The opinion in the Slocum case was written in 1912. Since then, and in 1919, the Congress has provided that the appellate courts may not reverse except for those errors which affect the substantial rights of the parties. Since the Seventh Amendment is concerned with substance and not with form, it follows that the form of the ruling of the trial court could not possibly have affected the substantial rights of the plaintiff, and that the point now raised is purely technical and an attempt to raise a mere mode of procedure into a substantive right.

The federal statute of jeofaile (40 U. S. Stat. at L. 1181, Tit. 28, Sec. 391, U. S. C. A., quoted *supra*) is of comparatively recent origin. Similar state statutes, however, have long been in existence, and the state courts have uniformly applied them to situations identical with that presented by this record. In 4 C. J. 1171, the rule is thus announced:

> "It is held, generally *under statute*, that where the judgment was right on the merits, it will not be reversed for technical error in *dismissing the complaint*, in withdrawing the case from the jury, in directing a verdict, or in not submitting the case, or certain questions involved therein to the jury." (Italics ours.)

A similar question arose in Missouri, and the court in *Hall* v. *Small*, 178 Mo. 629, 634, applied the statute of jeofaile as follows:

> "The answer stated no defense whatever, and the court properly excluded the evidence offered in support of the answer. The court *erred*, however, in holding that the case was in equity, and *in discharging the jury*. The petition stated a cause of action

in ejectment. The answer attempted to set up an equitable defense, but it was not a cross-bill in equity asking affirmative relief. The case remained, therefore, an action at law. But *that ruling of the court does not constitute reversible error, under the statute.* Sec. 865, R. S. 1899 (now Sec. 1062, R. S. Mo. 1929, the Missouri statute of jeofaile, identical in substance with the Congressional statute now being considered). For no defense being pleaded or proved the plaintiff was entitled upon the pleadings to a peremptory instruction to the jury to find for her, and the judgment, therefore, is for *the right party, and therefore it is affirmed.*" (Italics and parenthetical insert ours.)

So, also, in *Barrett* v. *Shipley,* 206 Pac. 430, 431, the Supreme Court of Montana, under the same statute, ruled:

"It is contended, further, that the court erred in directing a verdict, and that the proper practice should have been to grant a non-suit or dismiss the complaint, in conformity with the provisions of subdivision 5, Sec. 9317, R. C. M. 1921. Speaking with technical precision, this contention is well founded. A motion for a directed verdict is, in legal effect, a demurrer to the evidence (*McIntyre* v. *Northern Pacific Railway Co.,* 56 Mont. 43, 180 Pac. 971), and, since there was not any evidence before the court, the proceeding was irregular; but a cause will not be reversed for a mere technical error which does not affect the substantial rights of the party complaining (Section 9191, R. C. M. 1921). Plaintiff was not injured by the irregularity, for he is not placed in a worse position than he would have been if the court had observed strictly the provisions of Section 9317 above."

To the same effect are the cases cited in the text and notes of 4 C. J. 1171, *supra*.

As before stated, the Seventh Amendment is concerned with matters of substance, and not of mere form of procedure. The Seventh Amendment does not protect the petitioner as against a directed verdict; and, since the respondent was entitled to a directed verdict, the mere form or mode of procedure by which judgment was rendered for respondent could not possibly have affected the "substantial rights" of the petitioner. Under the statute, therefore, the alleged error is harmless and does not justify reversal.

It would be a gross miscarriage of justice to require respondent to submit to another trial for the mere purpose of having the trial court sustain a motion for a directed verdict. The Seventh Amendment contemplates no such result; and the statute forbids it.

Conclusion.

This case was fairly tried, and the result reached, both in the trial court and in the Court of Appeals, was manifestly right. In its final analysis, the record is but another illustration of a losing race with death at a railroad crossing—a race run in broad daylight, in the open country, and with an unobstructed view, for over two thousand feet, of an oncoming passenger train.

> "If parties driving automobiles persist in gambling with death at railroad crossings, their estates should not be augmented by damages if death wins."

We respectfully submit that the decision below should be affirmed.

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